

1991

Andreini v. Hultgren : Brief of Appellee

Utah Supreme Court

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BRIEF

IN THE UTAH SUPREME COURT

EUGENE R. ANDREINI, :
Plaintiff/Appellant, : Case No. 910173
vs. :
BRUCE HULTGREN, M.D., R. : Priority No. 16
DAVID BECK, M.D., and HOLY :
CROSS HOSPITAL, a Utah :
corporation, :
Defendant/Appellees. :

BRIEF OF APPELLEE BRUCE HULTGREN, M.D.

APPEAL FROM SUMMARY JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE PAT B. BRIAN, DISTRICT JUDGE

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UTAH

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to Utah Code Ann., § 78-2-2(3)(j).

II. STATEMENT OF ISSUES AND STANDARD OF APPELLATE REVIEW

Issues

1. Was the trial court correct in granting the motion for summary judgment of defendant Bruce Hultgren, M.D. (Dr. Hultgren), based on the statute of limitations applicable to actions against health care providers contained in Utah Code Ann. § 78-14-4, when the undisputed facts established that plaintiff Eugene R. Andreini (Andreini) knew more than two years prior to serving a Notice of Intent to Commence Action on Dr. Hultgren that he had sustained an injury and that the injury was allegedly caused by negligent action?

2. Was the trial court correct in granting Dr. Hultgren's motion for summary judgment on the basis of Utah Code Ann. § 78-14-12 when the undisputed facts established that Andreini filed a Request for Pre-Litigation Panel Review with the Department of Commerce more than 60 days after filing his Notice of Intent to Commence Action against Dr. Hultgren?

Standard of Appellate Review

This appeal from a summary judgment presents only questions of law, and this Court reviews the lower court's ruling for correctness and accords no particular deference to

the conclusions reached by the trial court. Madsen v. United Television, Inc., 797 P.2d 1083 (Utah 1990).

III. DETERMINATIVE STATUTES

78-14-4. Statute of limitations-- Exceptions--Application.

(1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs

78-14-8. Notice of intent to commence action.

No malpractice action against a health care provider may be initiated unless and until the plaintiff gives the prospective defendant or his executor or successor, at least ninety days' prior notice of intent to commence an action.... Such notice shall be served within the time allowed for commencing a malpractice action against a health care provider.

78-14-12. Department of Commerce to provide panel--Exemption--Procedures-- Statute of limitations tolled-- Composition of panel--Expenses-- Department authorized to set license fees.

...

(2) The party initiating a medical malpractice action shall file a request for prelitigation panel review with the Department of Commerce within 60 days after the filing of a statutory notice of intent to commence action under Section 78-14-8....

IV. STATEMENT OF THE CASE

A. Nature of the Case

This is a medical malpractice action arising from an injury allegedly occurring in conjunction with a right total knee replacement performed by defendant R. David Beck, M.D. (Dr. Beck) with defendant Bruce Hultgren, M.D. (Dr. Hultgren) acting as the anesthesiologist at defendant Holy Cross Hospital (the Hospital) on May 5, 1987.

B. Course of Proceedings

Each of the defendants, Dr. Hultgren, Dr. Beck, and the Hospital, filed a separate motion for summary judgment (Record (hereafter R.) at pp. 95-97, 109, 110, and 153-155). The Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Pat B. Brian presiding, ruled by minute entry on December 19, 1990 that Dr. Hultgren's motion for summary judgment should be granted (R., p. 268). On February 20, 1991, the District Court entered Findings of Undisputed Facts, Conclusions of Law, and Summary Judgment in Favor of Bruce Hultgren, M.D. (R., pp. 309-312). A copy is attached under tab 1. On February 1, 1991, the District Court ruled by minute entry that Dr. Beck's motion for summary judgment and the Hospital's motion for summary judgment should be granted (R., p. 308). On March 4, 1991, the District Court entered Findings of Fact, Conclusions of Law, and Summary Judgment on behalf of Dr. Beck and the Hospital (R., pp. 315-319).

C. Disposition in Court Below

Each defendant's motion for summary judgment was granted by the trial court. Summary judgment was entered in favor of Dr. Hultgren on February 20, 1991. Summary judgment was entered in favor of Dr. Beck and the Hospital on March 4, 1991.

D. Statement of Facts

1. May 5, 1987--Plaintiff Eugene R. Andreini (Andreini) underwent surgery for a total right knee replacement at the Hospital. The surgery was performed by Dr. Beck with Dr. Hultgren acting as anesthesiologist (R. at pp. 3, 71, 72, and 174).

2. May 5 through May 11, 1987--Upon regaining consciousness after surgery, Andreini noticed a tingling sensation or loss of feeling in his fingers and later in his elbows which increased over time. He experienced a loss of strength in his hands, and his fingers began to curl up. (R. at pp. 4, 72, 73, and 174; Deposition of Eugene R. Andreini, August 30, 1990 (hereafter Andreini depo.), pp. 37-45, 87-92 (a copy of those pages is attached under tab 2)).

3. May 11, 1987--Dr. Beck ordered elbow pads to prevent further compression on the nerves at the elbow which he felt was the cause of the problems Andreini was experiencing in his hands and elbows (Andreini depo., pp. 39, 87, and 88; R., at pp. 72 and 174; R. David Beck, M.D.'s Answers to

Interrogatories, answer to interrogatory no. 28 (a copy of the relevant portions of those answers is attached under tab 3)).

4. By May 11, 1987, when Dr. Beck ordered the elbow pads, Andreini had formed the opinion that something had gone wrong during the surgery to cause the problems he was experiencing in his hands and elbows. Andreini's deposition testimony in that regard is as follows:

Q. Did this symptom, this tingling, this mild tingling on your--in your little fingers--did that condition ever change?

A. It slowly increased. When I say, "slowly," I mean to the point where I was concerned enough about it that I talked to Dr. Beck. And I think on the 11th he ordered some kind of elbow pads or something.

...

Q. By the time you got the elbow pads, you were becoming quite concerned because you were getting some curling up of your little fingers?

A. Yes.

Q. And you were losing the strength in your hands?

A. Yes.

Q. And you were getting this tingling sensation or loss of feeling?

A. Yes.

Q. And I take it by the time Dr. Beck ordered the pads on your elbows, you thought it was likely that something had gone wrong during the surgery to cause the problem with your hands and arms; was that correct?

A. Yes.

Q. And that is because you didn't have the problem when you went in; is that true?

A. Yes.

(Andreini depo., pp. 39, 87-91 (emphasis added)).

5. May 12, 1989--Andreini served a Notice of Intent to Commence Action on Dr. Hultgren alleging that he sustained an injury to the nerves in his hands due to the negligence of Dr. Hultgren and other health care providers during the May 5, 1987 surgery (R. at pp. 73, 84-86, and 174).

6. July 19, 1989--Andreini served on Dr. Hultgren a Request for Prelitigation Review (R. at pp. 73, 89-93, and 174).

V. SUMMARY OF ARGUMENTS

A.

No later than May 11, 1987, Andreini knew that he had sustained an injury and that the injury was allegedly caused by negligent action. The two-year statute of limitations applicable to malpractice actions against health care providers began to run on May 11, 1987. Andreini did not file a Notice of Intent to Commence Action against Dr. Hultgren until May 12, 1989. Andreini's Notice of Intent to Commence Action was not timely filed, and Andreini's claim against Dr. Hultgren is barred by the statute of limitations of Utah Code Ann. § 78-14-4(1). The District Court's summary judgment in

favor of Dr. Hultgren on the basis of the statute of limitations should be affirmed.

B.

Andreini's Notice of Intent Commence Action was served on May 12, 1989. On July 19, 1989, more than 60 days thereafter, Andreini filed a Request for Pre-Litigation Review. Under Utah Code Ann. § 78-14-12(2), Andreini's Request for Pre-Litigation Review is not timely, and is, therefore, procedurally deficient. The District Court's summary judgment in favor of Dr. Hultgren for Andreini's failure to file a timely Request for Pre-Litigation Review should be affirmed.

VI. ARGUMENT

A. ANDREINI'S CLAIM AGAINST DR. HULTGREN IS BARRED BY THE STATUTE OF LIMITATIONS

The District Court ruled that Andreini's claim against Dr. Hultgren was barred by the two-year statute of limitations applicable to malpractice actions against health care providers and granted Dr. Hultgren's motion for summary judgment. The District Court's ruling is correct and should be affirmed.

The statute of limitations applicable to malpractice actions against health care providers is found at Utah Code Ann. § 78-14-4(1). It provides in part as follows:

No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence

should have discovered the injury,
whichever first occurs....

Further, a malpractice action against a health care provider may not be initiated "unless and until the plaintiff gives the prospective defendant or his executor or successor, at least ninety days' prior notice of intent to commence an action." Utah Code Ann. § 78-14-8. That notice "shall be served within the time allowed for commencing a malpractice action against a health care provider." Id.

The two-year limitation provision contained in § 78-14-4

does not commence to run until the injured person knew or should have known that he had sustained an injury and that the injury was caused by negligent action.

Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979). Under these statutory provisions and the "legal injury" concept set forth Foil, Andreini must have served his Notice of Intent to Commence Action within two years of the time when he knew or should have known that he sustained an injury and that the injury was caused by negligent action.

By May 11, 1987, Andreini knew both that he had sustained the injuries of which he complains in this action and that those injuries were caused by allegedly negligent action. The total knee replacement surgery took place May 5, 1987. For several days thereafter, Andreini experienced numbness, tingling, and other problems with his arms, hands, and fingers. He had not experienced those problems prior to the

total knee replacement surgery. In his deposition testimony, Andreini acknowledges that as of May 11, 1987 he was aware that he was having problems with his arms, hands, and fingers and that something had gone wrong during the surgery to cause those problems.

Under Foil, the statute of limitations began to run on May 11, 1987 when Andreini knew that he had sustained an injury and that the injury was allegedly caused by negligent action. Since he did not file a Notice of Intent to Commence Action against Dr. Hultgren until May 12, 1989--over two years later--his claim against Dr. Hultgren is time barred.¹

This conclusion is well supported by case law. For example, in Reiser v. Lohner, 641 P.2d 93 (Utah 1982), Reiser suffered a cardiac arrest in connection with an amniocentesis. Plaintiffs claimed that they did not become aware that the injuries resulting from the cardiac arrest were permanent until sometime later and consequently did not commence legal action until nearly three years after that event. In upholding the dismissal of the action as being time-barred, the Court stated as follows:

The exception of Foil v. Ballinger is not applicable here. Mrs. Reiser knew or should have known that she suffered a legal injury on June 26, 1971 [the day she suffered the cardiac arrest]....

¹Interestingly, Andreini's Notices of Intent to Commence Action with respect to Dr. Beck and the Hospital were timely served.

[T]he very acknowledgement that [Mrs. Reiser] was suffering disorders as a result of the incident (whether temporary or permanent) would show that plaintiffs should have known that they had suffered legal injury at the time of the cardiac arrest.

Id. at pp. 99 and 100 (emphasis in original).

In Floyd v. Western Surgical Associates, Inc., 773 P.2d 401 (Utah App. 1989), Floyd brought a malpractice action seeking damages resulting from allegedly unnecessary surgery performed by Dr. Lindem on December 9, 1981. Floyd testified in his deposition that in March or April of 1982, he learned for the first time that Dr. Lindem had performed surgery to which he had not consented. He further testified that in September 1982, he informed another doctor that Dr. Lindem had performed the allegedly unnecessary surgery and that his problems were probably caused by the surgery. In affirming the trial court's summary judgment dismissing Floyd's claims as barred by the statute of limitations set forth in § 78-14-4, the Utah Court of Appeals stated as follows:

...Floyd's deposition testimony establishes that Floyd was aware in September of 1982 that Dr. Lindem performed surgery in addition to the hiatal hernia surgery and that his symptoms were caused by the additional surgery. In contrast to Foil, Floyd had made the connection between the surgery and his symptoms, according to his clear deposition testimony. Therefore, by September 1982, at the latest, Floyd discovered or should have discovered the injury and that the additional surgical procedures caused his injury.

Id. at p. 773.

Additionally, in Brower v. Brown, 744 P.2d 1337 (Utah 1987), Brower suffered a puncture wound in her right thigh while under anesthesia during a hysterectomy performed by Dr. Brown. She also suffered complications from the hysterectomy itself. She made a claim both for the puncture wound and for the complications from the hysterectomy. The Supreme Court's equally-divided decision affirmed the trial court's summary judgment dismissing the action relating to the puncture wound as being time barred. In his opinion in favor of affirming summary judgment, Justice Zimmerman wrote as follows:

...[T]here is no question on the record that on October 22, 1980, when plaintiff was wheeled out of the recovery room and saw blood spurting from the wound in her leg, she knew that she had received a puncture wound that was not part of her surgical procedure. She inquired about the wound and never received a satisfactory explanation as to how it occurred. This was enough, as a matter of law, to place her on notice that she had received a legal injury.

Id. at p. 1340 (emphasis added).

Despite Andreini's deposition testimony indicating plainly that as of May 11, 1987 he knew both that he had sustained an injury and that the injury was allegedly caused by negligent action, Andreini claims that the statute should not begin to run until July 2, 1987 when he was informed by Dr. Nord of the specific medical terminology applicable to the problems he was experiencing and by an unnamed Ogden nurse that the nerve damage to his hands "may have" resulted from

the strapping of his arms during the total knee replacement surgery. That argument is without merit.

A similar argument was considered and rejected by the Utah Court of Appeals in Deschamps v. Pulley, 784 P.2d 471 (Utah App. 1989). In that case, plaintiff claimed that she could not know of the legal injury under § 78-14-4 until she obtained a favorable expert opinion confirming her suspicion of negligence. In rejecting that argument, the Utah Court of Appeals stated as follows:

If we accepted Ms. Deschamps' position that she could not know of her legal injury until she received an expert medical opinion confirming malpractice, the statute would be tolled in every case until a plaintiff not only decided to seek, but found favorable expert testimony.

Id. at p. 475.

Similarly, in Hargett v. Limberg, 598 F.Supp. 152 (D. Utah 1984), reversed on other grounds, 801 F.2d 368 (10th Cir. 1986), plaintiffs claimed that Dr. Limberg failed to diagnose an infant's meningitis in a timely manner. When the meningitis was finally diagnosed, the infant was transferred to Utah Valley Hospital. The infant's mother testified in her deposition that upon arriving at Utah Valley Hospital she told another doctor that she felt Dr. Limberg had been negligent in waiting too long to diagnose the meningitis. Plaintiffs argued that those statements did not indicate knowledge of legal injury as required by the Utah Supreme Court in Foil. Plaintiffs contended that the infant's mother did not discover

the possibility of a legal injury until she consulted a lawyer sometime later. In response to that argument, the Court stated as follows:

That argument, however, is without merit and confuses "legal injury" with a legal conclusion of negligence.

Under Foil, and its progeny, a legal determination of negligence is not necessary to start the statute of limitations. Rather, the crucial question is whether the plaintiff was aware of the facts that would lead a reasonable person to conclude that he may have a cause of action against the health care provider. Those facts include the existence of an injury, its cause and the possibility of negligence.

Id. at pp. 154 and 155. See also, Duerden v. Utah Valley Hospital, 663 F.Supp. 781 (D. Utah 1987), aff'd, 876 F.2d 108 (10th Cir. 1989) ("...[U]nder Utah law a plaintiff need not know the full nature, extent, severity or permanency of an injury to have knowledge of 'legal injury' necessary to commence the running of the statute of limitations....").

The facts of this case are entirely consistent with the facts of the cases cited above where the Courts have held that the action was time barred. According to Andreini's own testimony, he became aware no later than May 11, 1987 of the physical injuries of which he complains in this action and that they were allegedly caused by negligent action. The two-year statute of limitations contained in § 78-14-4 began to run no later than May 11, 1987. Andreini did not file his Notice of Intent to Commence Action against Dr. Hultgren until

May 12, 1989, more than two years after the statute of limitations began to run. Andreini's claim against Dr. Hultgren was not timely filed. The District Court's summary judgment in favor of Dr. Hultgren was proper and should be affirmed.

B. ANDREINI'S CLAIM AGAINST DR. HULTGREN IS BARRED BECAUSE HIS REQUEST FOR PRE-LITIGATION REVIEW IS PROCEDURALLY DEFICIENT

The District Court ruled that Andreini's Request for Prelitigation Review was not filed within 60 days after filing his Notice of Intent to Commence Action as required by § 78-14-12(2) and is, therefore, procedurally deficient. On that basis, the District Court granted Dr. Hultgren's motion for summary judgment. The ruling is correct and should be affirmed.

Utah Code Ann. § 78-14-12(2) states in relevant part as follows:

The party initiating a medical malpractice action shall file a request for pre-litigation panel review with the Department of Commerce within 60 days after the filing of a statutory notice of intent to commence action under Section 78-14-8.

Andreini served a Notice of Intent to Commence Action on May 12, 1989. More than 60 days later, on July 19, 1989, Andreini filed and served on Dr. Hultgren a Request for Pre-Litigation Review.² Andreini's Request for Pre-Litigation

²Andreini's Request for Pre-Litigation Review with respect to Dr. Beck and the Hospital was timely filed.

Review does not comply with the requirements of § 78-14-12(2) mandating dismissal of his malpractice action.

Despite his untimely filing of a Request for Pre-Litigation Review, Andreini argues that he complied with the appropriate procedure requirements since the Director of the Division of Occupational and Professional Licensing issued an Affidavit of Compliance. An Affidavit of Compliance does not absolve procedural irregularities. Pre-litigation hearings may be held even where compliance with the Utah Health Care Malpractice Act is in dispute. The Division is not empowered and is not the proper forum to decide whether a statutory requirement of the Act has been met. Andreini's failure to file a timely Request for Pre-Litigation Review was not corrected by the Affidavit of Compliance.

Andreini also argues that Dr. Hultgren should be estopped from asserting any procedural error because Dr. Hultgren's counsel requested that his pre-litigation review be separated from that of the Hospital and Dr. Beck. The later pre-litigation review hearing for Dr. Hultgren was not a matter of accommodation but a matter of right resulting from Andreini's failure to serve Dr. Hultgren with a timely Notice of Intent to Commence Action and Request for Pre-Litigation Review.

Andreini failed to comply with the provisions of § 78-14-12(2) by filing a Request for Pre-Litigation Review more than 60 days after he served a Notice of Intent to Commence Action on Dr. Hultgren. The District Court correctly granted summary

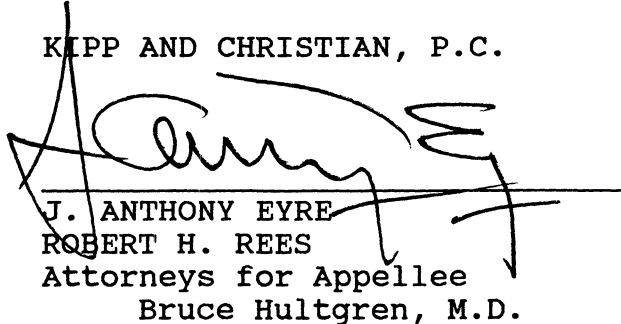
judgment in favor of Dr. Hultgren, and that judgment should be affirmed.

VII. CONCLUSION

For the foregoing reasons, defendant/appellee Bruce Hultgren, M.D. respectfully requests the Court to affirm the summary judgment in his favor.

DATED this 15th day of October, 1991.

KIPP AND CHRISTIAN, P.C.



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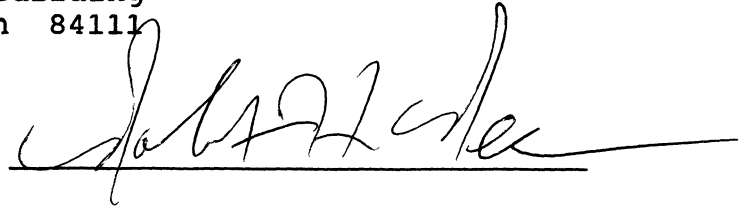
CERTIFICATE OF MAILING

MAILED, postage prepaid, this 15th day of October, 1991,
four true and correct copies of the foregoing Brief of
Appellee Bruce Hultgren, M.D. to the following:

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A handwritten signature in black ink, appearing to read "Philip R. Fishler", is written over a horizontal line.

ATTACHMENTS

1. District Court Findings of Undisputed Facts, Conclusions of Law, and Summary Judgment in Favor of Bruce Hultgren, M.D.
2. Portions from Deposition of Eugene R. Andreini
3. Relevant Portions of R. David Beck, M.D.'s Answers to Interrogatories

Tab 1

FILED DISTRICT COURT
Third Judicial District

FEB 20 1991

SALT LAKE COUNTY
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Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

EUGENE R. ANDREINI,	:	FINDINGS OF UNDISPUTED
Plaintiff,	:	FACTS CONCLUSIONS OF LAW AND
vs.	:	SUMMARY JUDGMENT IN FAVOR
	:	OF BRUCE HULTGREN, M.D.
BRUCE HULTGREN, M.D., R.	:	
DAVID BECK, M.D., and HOLY	:	Civil No. 890905577PI
CROSS HOSPITAL, a Utah	:	
corporation,	:	
Defendants.	:	Judge Pat B. Brian

The Motion for Summary Judgment of Defendant Bruce Hultgren, M.D. has been considered by the Court; based upon the record of the case, the Court now adopts the following Findings of Undisputed Facts:

FINDINGS OF UNDISPUTED FACTS

1. On May 5, 1987, Plaintiff had a surgical procedure performed for a total right knee replacement at Holy Cross Hospital. The surgery was performed by R. David Beck, M.D., and Bruce Hultgren, M.D. (Dr. Hultgren) was the anesthesiologist.

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2. On May 11, 1987, following the surgical procedure the Plaintiff became aware that he had sustained an injury to his hands and arms and felt that the injury had been caused by something that had gone wrong during the surgical procedure.

3. On May 12, 1989, Plaintiff served his Notice of Intent to Commence Action on Dr. Hultgren.

4. On July 19, 1989, Plaintiff filed and served a Request for Prelitigation Review on Dr. Hultgren.

From the foregoing Findings of Undisputed Facts, the Court now draws the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The statute of limitations with respect to Plaintiff's claim against Dr. Hultgren commenced to run on May 11, 1987 in that he was aware of his "legal injury" on that date.

2. The Plaintiff's claim against Dr. Hultgren is barred by the two-year statute of limitations contained in Section 78-14-4, U.C.A.

3. The Plaintiff's Request for Prelitigation Review against Dr. Hultgren is procedurally deficient in that it was not served within 60 days after the Notice of Intent to Commence Action as required by the provisions of Section 78-14-12(2), U.C.A.

Based upon the foregoing Findings of Undisputed Facts and Conclusions of Law, the Court now enters the following Summary Judgment:

SUMMARY JUDGMENT

The Complaint of the Plaintiff Eugene R. Andreini against
the Defendant Bruce Hultgren, M.D. is dismissed with prejudice.

DATED this 20 day of January, 1991.

BY THE COURT:



PAT B. BRIAN
District Court Judge

CERTIFICATE OF MAILING

MAILED, postage prepaid, this 14 day of January, 1991,
a true and correct copy of the foregoing Findings of Undisputed
Facts, Conclusions of Law and Summary Judgment in Favor of Bruce
Hultgren, M.D., to the following:

Matt Biljanic
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Midvale, Utah 84047

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Salt Lake City, Utah 84145

Quinn Crabb

Tab 2

CERTIFIED COPY

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

EUGENE R. ANDREINI,

Plaintiff,

vs.

BRUCE HULTGREN, M.D., et al.,

Defendants.

Deposition of:

Eugene R. Andreini

Civil No. 890905577PI

BE IT REMEMBERED that on the 30th day of August
1990, commencing at the approximate hour of 10:00 a.m.,
the deposition of Eugene R. Andreini was taken at the law
offices of Strong & Hanni, Sixth Floor Boston Building,
Salt Lake City, Utah, before Julie N. Clegg, a Certified
Shorthand Reporter, Registered Professional Reporter and
Notary Public in and for the State of Utah.

* * *

(801) 943-7356

1 restrained during the operation?

2 A. No.

3 Q. When you woke up in the hospital room on the
4 floor, how did your knee feel?

5 A. Painful.

6 Q. Did you notice anything else unusual about your
7 condition?

8 A. I was in quite an extreme amount of pain for the
9 first few hours, and the only other thing that I
10 noticed -- and it didn't seem important to me at the
11 time -- was on my little fingers just -- just like a
12 little -- like the touch of a feather on the outside
13 edges of my fingers.

14 Q. What do you mean by it felt like a touch of a
15 feather?

16 A. Just like barely feels like -- barely, barely
17 touching the skin on the outside edge of your little
18 finger, like a tingling -- little tingling sensation. It
19 wasn't painful and it wasn't any discomfort.

20 Q. When did you first notice that?

21 A. Oh, as soon as I started regaining consciousness
22 pretty good, you know, to where I was out from under the
23 effects of the anesthesia or the pain medication, or
24 whatever it was, where I could talk and was coherent.

25 Q. Was this while you were in the room?

1 A. Yes.

2 Q. Did you mention this to anyone?

3 A. Well, I mentioned it to my mother and Sarah, and
4 I mentioned it to the nurse. But it never got in the
5 charts, so --

6 Q. Who was the nurse?

7 A. I don't have any idea. She just was asking the
8 routine common questions, it seemed like: "How do you
9 feel? or "Did you notice anything?" -- or whatever. But
10 she didn't think it was important about as much as
11 probably I didn't at that time.

12 Q. And about when was it that you mentioned this to
13 the nurse?

14 A. It was probably the first or second day. I
15 mean, it wasn't -- I wasn't really -- like I said, it --
16 I wasn't really that concerned at that time. I had so
17 much pain in my leg and stuff, I was preoccupied with
18 that.

19 Q. We talk about what we call the first
20 postoperative day and the first postoperative day would
21 be May 6th. Are you with me when I say what the first
22 postoperative day is?

23 A. Sure.

24 Q. Did you mention this to anyone prior to the
25 first postoperative day?

1 A. Prior to the first postoperative day? That
2 would be the day that I came out from surgery?

3 Q. No. That would be the operative day. May 5th
4 was the operative day. On May 5th, did you mention this
5 to anyone?

6 A. My mother and Sarah and the nurse, I believe.
7 The nurse was either the first or second day.

8 Q. Okay. Did you tell anyone else?

9 A. On the third or fourth day, to the physical
10 therapist because they were getting me up.

11 Q. Did this symptom, this tingling, this mild
12 tingling on your -- in your little fingers -- did that
13 condition ever change?

14 A. It slowly increased. When I say, "slowly," I
15 mean to the point where I was concerned enough about it
16 that I talked to Dr. Beck. And I think on the 11th he
17 ordered some kind of elbow pads or something.

18 Q. Let's talk about May 6th.

19 A. Oh. There was one other person that I mentioned
20 it to.

21 Q. Who?

22 A. Dr. Nichols came by, just dropped in to see me.

23 Q. What day was that?

24 A. Oh, I don't know. About the fourth day, or
25 something like that, when he knew I was --(pause.) I

1 mentioned my hands to him, but he's since got an extreme
2 case of amnesia.

3 Q. What do you mean by that? He doesn't remember
4 this?

5 A. He don't want to be involved. I would assume he
6 says so. I don't recall. I can't remember.

7 But we did talk about it -- and in fact he
8 talked to me about it in his office later. He says,
9 "Well, I'm sorry if you had said --" You know, that day
10 he told me: "Just tell your doctor. Tell your doctor.
11 Tell your doctor." And he says, "When I just came to
12 visit you socially, if you had asked me as a doctor, I
13 could have told you what to do."

14 But he doesn't recall any of the conversation,
15 but I guess in his mind it doesn't exist. Doctors will
16 be doctors, I think.

17 Q. And is there anyone else you told prior to your
18 discharge from the hospital?

19 A. I can't -- I can't -- oh, prior to my discharge
20 from the hospital?

21 Q. Yes, sir.

22 A. That was like 14 days?

23 Q. Yes, sir.

24 A. Oh, yeah. Just about everybody. I mean, they
25 were all aware of it.

1 Q. What symptoms were you having in your hands or
2 arms on your discharge?

3 A. The little fingers start curling up. They were
4 a lot more -- they were more like this. They were real
5 tight. They just kept drawing.

6 Q. Did you have any pain in your hands?

7 A. No, never was painful.

8 Q. Just numb?

9 A. Just a lot of numbness, weakness; and you could
10 start to see atrophy like in the back here, like a sunken
11 in. And the muscle in the palm of the hand would -- was
12 getting small like you could feel it when you'd just --
13 crutches and that. It's like I would -- bone bruise
14 trying to hold my weight on the crutches, and things like
15 that.

16 Q. You say that you mentioned this to Dr. Beck?

17 A. Yes.

18 Q. When was the first time you mentioned it to Dr.
19 Beck?

20 A. The first time I seen him.

21 Q. Tell me when that was.

22 A. I don't know. When he came in to me or see me
23 after the surgery.

24 Q. Was that the same day?

25 A. No. I think the first couple of days he had a

1 doctor that was assisting him.

2 Q. Who was that?

3 A. Dr. West.

4 Q. What's his first name?

5 A. I don't know. He removed like the tube from my

6 knee.

7 Q. Did you ever tell Dr. West about this?

8 A. Yes.

9 Q. When did you tell Dr. West?

10 A. When he came to the room, which would be --

11 second, third day.

12 Q.. Are you saying that neither Dr. West nor Dr.

13 Beck saw you on the day of the operation, after the

14 operation was completed?

15 A. I can't say for certain. I was kind of drugged.

16 Q. Did you mention it to any other physicians,

17 other than West, Nichols and Beck?

18 A. No. They were the only ones I seen.

19 Q. Now, when you mention it to Dr. West, was this

20 in the room?

21 A. Yes.

22 Q. And what did Dr. West say to you?

23 A. He said that we'd have to talk to Dr. Beck.

24 Q. What did you say?

25 A. I said I'd talk to Dr. Beck when he came in.

1 Q. When you talked to Dr. West, what were the
2 symptoms that you were encountering?

3 A. Tingling and the drawing up of the little
4 fingers.

5 Q. When you mentioned it to Dr. Beck, what did he
6 say?

7 A. He said that he would order those elbow pads.

8 Q. After the operation, did you notice any bruising
9 on your elbows?

10 A. No.

11 Q. Did you notice anything that was unusual after
12 the operation, other than the pain in your right knee and
13 what you've told us about?

14 A. The other symptom that I had, which I still
15 have, is like right under here. If you just rub your
16 fingers on it, you get like a tingling on -- of course
17 Dr. Beck told me not to do that. He says it just -- it's
18 aggravating that ulnar nerve. And I'm talking about just
19 lightly, lightly touching -- like feels like small
20 electrical charge or something in the elbow. And I think
21 that was one of the reasons for the elbow things, trying
22 to keep those from being aggravated.

23 Q. Did Dr. Beck ever say to you what the cause of
24 this problem might be?

25 A. He mentioned one time that he thought it was

1 from laying in bed.

2 Q. Did he ever venture any other opinion as to what
3 the cause of this tingling was?

4 A. Well, yeah. He didn't want to like incriminate
5 himself to anything. It's like it could be hereditary,
6 it could have been going to happen anyway, it could have
7 been my body structure, it could have been -- I mean, he
8 come up with a lot of things that it could be -- be
9 anything and everything except maybe somebody's fault.

10 Q. Did you ever tell him what you thought the
11 problem was or what caused the problem?

12 A. I didn't, no.

13 Q. Did you ever indicate to him that you thought it
14 might be as a result of the surgery?

15 A. Oh, he knew that that was how I felt. I mean, I
16 went in and everything was okay and my hands worked, and
17 I come out and they were bad. So, I mean, it was -- I
18 don't know what it was, but obviously something went
19 wrong. We even discussed the fact that it was
20 probably -- that it was so coincidental that both arms at
21 the same time.

22 Q. Are the symptoms in both arms the same?

23 A. Yup.

24 Q. Do you notice the symptoms in both arms at the
25 same time?

1 A. Yes.

2 Q. Was the progression the same?

3 A. Yes.

4 Q. Did you ever talk to anyone on the nursing staff
5 who ventured an opinion about what the cause of this
6 problem was?

7 A. Not the nurses, the physical therapists.

8 Q. And what did the physical therapists say?

9 A. They were real noncommittal about anything. They
10 just -- the only comment, they would like it -- like my
11 hands were kind of numb. It was like what they called a
12 glove effect, your hands feel like -- up in the wrist,
13 that this -- that you are in a glove.

14 They didn't want to get in the middle of nothing
15 or nobody. They were --

16 Q. Dr. Hultgren, did you ever discuss it with him?

17 A. Never seen him after the surgery.

18 Q. Did you ever see him before the surgery?

19 A. One day when he came in. I think it was the day
20 before or the day after, or something like that.

21 Q. Did Dr. Beck ever suggest that someone ought to
22 operate on your arms?

23 A. I kept complaining to him until he told me I
24 should go see Dr. Nord, a neurologist, friend of his.

25 Q. Did you go see Nord?

1 A. I guess I got the date off my medical bill. I
2 just know that he ordered them; and I don't know whether
3 I talked to him on the 10th and I got them the 11th or
4 what.

5 Q. But the date of the 11th is when you got the
6 elbow pads?

7 A. That's when I was **billed** for them, is all I
8 know.

9 Q. And you do have a memory of having received
10 them; is that correct?

11 A. Oh, yeah, wearing them.

12 Q. And that you said that it was perhaps May the
13 8th or thereabouts when you told Dr. Nichols about the
14 problem you were having with your hands; is that correct?

15 A. Yes.

16 Q. In that time frame, that is, May 8th, 9th, 10th
17 and the 11th, were you having this sensation in your
18 elbow where you would get a tingling, when you would
19 touch it with your hand or touch your elbow against
20 something?

21 A. Yeah. It was just something that I had kind
22 of -- I noticed, you know, just -- oh, yeah, Dr. Beck
23 told me, he says, "Don't do that. That just aggravates
24 it." So that's why he ordered the pads -- I think one of
25 the reasons, so I couldn't.

1 Q. Do you believe it was before May the 11th that
2 you told Dr. Beck about the problem with your hands?

3 A. Yes.

4 Q. Tell me about how many days you believe it was
5 that you told Dr. Beck, when you first told Dr. Beck
6 about the problem with your hands.

7 A. Well, I'm sure -- I don't have any records. His
8 records would indicate the first time he came and seen me
9 in the room, because I told --

10 Q. Whenever that was, is when you told him?

11 A. Yeah. And -- well --

12 Q. I take it that -- and you said Dr. Nichols told
13 you to bring it up again with Dr. Beck.

14 A. (Nodding affirmatively.)

15 Q. Yes?

16 A. Yes. That's all he would say. Now he won't
17 even say that.

18 Q. By the time you got the elbow pads, you were
19 becoming quite concerned because you were getting some
20 curling up of your little fingers?

21 A. Yes.

22 Q. And you were losing the strength in your hands?

23 A. Yes.

24 Q. And you were getting this tingling sensation or
25 loss of feeling?

1 A. **Yes.**

2 Q. Are those yes's?

3 A. Yes. Yes. Excuse me.

4 Q. **And that you had told Dr. West about it before**
5 **you saw Dr. Beck after the surgery; is that true?**

6 A. I am sure that Dr. West is the one that I seen
7 **first. *Seemed like he had to do all of the dirty work.**

8 Q. Were you also -- at the time Dr. Beck gave you
9 the elbow pads, also getting some atrophy? That is, your
10 muscles were starting to waste? Or had that started to
11 set in yet?

12 A. No. The hands for the first week or so, I
13 couldn't tell by the time I was discharged -- which I
14 think was -- I think I was in there for 13 days or 14.
15 They had to knock me out again or manipulate the knee so
16 it was kind of an extended thing. By the time I left
17 **was really starting to notice it.**

18 Q. Notice the atrophy?

19 A. Yeah.

20 Q. I think you said that when -- whatever it was --
21 you saw Dr. West, and you thought it was maybe the 6th or
22 the 7th, that you were starting to have the drawing up of
23 the little fingers starting to curl up on you?

24 A. Yeah.

25 Q. And you also said that at one time when you

1 talked with Dr. Beck about the problem that you were
2 having, he said he thought it might be related to a
3 problem from lying in bed; is that correct?

4 A. Yeah. It seemed like he kept trying to sell me
5 on the idea that I was comatose or something.

6 Q. Was that conversation that you had with Dr.
7 Beck -- was that at about the time you were prescribed
8 the elbow pads, or was that sometime months later?

9 A. That conversation about me laying in the bed
10 like that?

11 Q. Yes.

12 A. Was right probably the visit, one or two maybe,
13 before he did the pads. I mean, when he finally decided
14 to order the pads, he was convinced that I wasn't going
15 to show up until he did something; and that was probably
16 the easiest thing to do.

17 Q. And I take it by the time Dr. Beck ordered the
18 pads on your elbows, you thought it was likely that
19 something had gone wrong during the surgery to cause the
20 problem with your hands and arms; was that correct?

21 A. Yes.

22 Q. And that is because you didn't have the problem
23 when you went in; is that true?

24 A. Yes.

25 Q. The first thing you recall when you woke up

1 after the surgery, you were starting to have the problem;
2 is that true?

3 A. Yes, tingling.

4 Q. After you decided that you wanted to bring a
5 lawsuit, records that I have indicate that you initially
6 consulted with an attorney, Roger Sharp; is that correct?

7 A. Yes.

8 Q. Was he the first lawyer you went to see about
9 asserting a claim against the defendants in this lawsuit?

10 A. He was either the first or the second.

11 Q. Who else did you see, other than Mr. Biljanic
12 and Mr. Sharp?

13 A. I don't even recall. I don't even recall his
14 name, but he -- he told me that he would have a conflict
15 of interest. And I think he's the one that referred me
16 to Sharp.

17 Q. And you said that you waited for some time
18 before going to an attorney to see if the nerve
19 transposition surgery done by Dr. Beck would be
20 successful in curing the problem; is that correct?

21 A. Yes. I gave him the year of that, that they
22 told me that it would take; and then I started seeing
23 attorneys at about 18 months.

24 Q. And the reason you didn't see them sooner was to
25 see if this problem would hopefully resolve; and if it

Tab 3

COPY

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

EUGENE R. ANDREINI,)	
)	
Plaintiff,)	ANSWERS TO INTERROGATORIES
)	
vs.)	
)	
BRUCE HULTGREN, M.D., R. DAVID))	Civil No. 890905577PI
BECK, M.D. and HOLY CROSS)	
HOSPITAL, a Utah corporation,)	
)	
Defendants.)	Judge Pat B. Brian

COMES NOW the defendant, R. David Beck, M.D., and pursuant to Utah Rules of Civil Procedure, submits the following Answers to Plaintiff's Interrogatories:

1. Q. Please state how many years you have practiced as an orthopedic surgeon.

A. 13 years

2. Q. How long have you been at Holy Cross Hospital?

A. 12 years

3. Q. Please state the number of times you have seen plaintiff in your office and briefly state what was done.

A. Nineteen times for outpatient management of

the text).

A. No such definition exists. Ulnar nerve palsy is a clinical syndrome consisting of numbness and weakness in the distribution of the ulnar nerve. No text cited.

27. Q. Please state what is ordinarily the cause of "bilateral ulnar nerve compression".

A. Bilateral ulnar nerve compression is caused by anything pushing on both ulnar nerves.

28. Q. Did you make a diagnosis of plaintiff's condition regarding his hands? If so, when did you make it and what was your diagnosis?

A. The diagnosis of ulnar nerve irritation was made on 5/11/87, at which point elbow pads were initiated. By 5/13 it was becoming apparent that it may well be an ulnar nerve neuropathy and by 5/18 the diagnosis was clear of ulnar neuropathy.

29. Q. Did you know about plaintiff's condition to his hands prior to May 12, 1987? If so, when.

A. No.

30. Q. Do you have an opinion as to the cause of plaintiff's bilateral ulnar neuropathy?

A. See answers to interrogatories 7, 8 and 9. There is no way of knowing exactly when the injury took place. It could have occurred over a lengthy period of time.

31. Q. Do you agree with Dr. Nord's evaluation of plaintiff's condition as stated in his letter dated August 27, 1987? If not please state the parts you disagree with.

A. The fee for total knee replacement, including all follow-up care, is \$2,800.00. I do not know the charge for hospital and anesthesiologist.

115. Q. Is it not true that bilateral neuropathy only occurs when one is completely unconscious and prolonged pressure of a constant nature is applied to a certain small vulnerable area? If your answer is no, please explain in detail.

A. The majority of neuropathies occur in conscious individuals over a period of time, due to small repeated insults.

116. Q. What could the plaintiff have done to avoid the bilateral neuropathy?


A. Probably nothing.

117. Q. Would a sleeping patient be likely to suffer a bilateral neuropathy? (assuming patient was under a mild sedation) If so, please explain in detail.

A. A great many people suffer bilateral ulnar neuropathy with prolonged and brief bed rest. Many people, if they read too late in bed, will have temporary mild ulnar neuropathy.

118. Q. If a patient is conscious and pressure is exerted upon the ulnar nerve in the elbow area, is it not true that discomfort arises causing the patient to move? (assume no disability preventing movement)

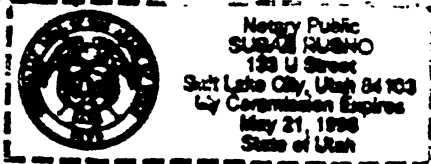
A. Yes, ordinarily this is true.



R. David Beck, M.D.

STATE OF Utah)
 : SS:
COUNTY OF Salt Lake)

Subscribed and sworn to before me this 6th day of December,
1989.



Susan Ruako
NOTARY PUBLIC
Residing at: 133 U Street, Salt Lake City,

My Commission Expires:

May 21, 1993

CERTIFICATION OF MAILING

I hereby certify that on this 6th day of December,
1989, a true and correct copy of the foregoing document was mailed,
postage prepaid to:

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